

**EXHIBIT A**

Drew C. Ensign (SBN 243956)  
**HOLTZMAN VOGEL BARAN  
TORCHINSKY & JOSEFIAK PLLC**  
2575 East Camelback Rd, Ste 860  
Phoenix, AZ 85016  
602-388-1262 (P)  
[densign@holtzmanvogel.com](mailto:densign@holtzmanvogel.com)

*Counsel for the State of Montana*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

PAYWARD, INC.; PAYWARD VENTURES,  
INC.,

## Defendants.

Case No.: 3:23-cv-06003-WHO

**BRIEF OF AMICUS CURIAE  
STATE OF MONTANA SUPPORTED  
BY SEVEN OTHER STATES IN  
SUPPORT OF NEITHER PARTY**

Honorable William H. Orrick III

## INTEREST OF AMICUS CURIAE

The State of Montana, supported by seven additional States whose support is noted below after the signature block, submits this amicus brief pursuant to the court’s order dated January 18, 2024. This amicus is in support of neither party because the State of Montana takes no position as to the conduct or business practices of Payward, Inc. and Payward Ventures, Inc. (collectively, “Payward”), but it opposes the Securities and Exchange Commission’s (“SEC”) regulation of crypto assets absent an investment contract because Congress has not delegated this authority to the SEC.<sup>1</sup>

States have a strong interest in preventing the potential preemption of consumer protection and other state laws by the SEC’s attempt to regulate crypto assets as securities. *See, e.g.*, Gary Gensler, SEC Chair, *Statement on the Approval of SpotBitcoin Exchange-Traded Products* (Jan. 10, 2024) (stating that the “vast majority of crypto assets are investment contracts and thus subject to the federal securities laws.”).<sup>2</sup> The SEC’s exercise of this undelegated authority puts consumers at risk by potentially preempting state statutes better tailored to the specific risks of non-securities products. Some state laws are *more* protective of consumers than the federal securities laws.

The SEC has described crypto assets as shares in a collective “ecosystem.” Mtn. to Dismiss, Dkt. 25 at 23-25 (citing SEC statements in Coinbase and Binance oral arguments). The States have been at the forefront of using their enforcement authority to protect consumers in the area of technology ecosystems. *See, e.g., Utah v. Google LLC*, No. 3:21-cv-05227JD (N.D. Cal.) (action challenging anticompetitive practices in the Google play store); *Texas v. Google LLC*, No. 4:20-cv-00957-SDJ (E.D. Tex) (action challenging anticompetitive practices in the ad tech industry). The States are committed to protecting consumers in diverse technology ecosystems and have a significant interest in the potential preemption of state laws that would impact those efforts.

## ARGUMENT

## **The SEC's Enforcement Action Exceeds its Delegated Powers.**

The SEC filed its complaint against Payward, a secondary market platform, alleging violations of the Exchange Act. *See* Compl., Dkt. 1 ¶¶ 447, 450, 453. The SEC's enforcement action is based

<sup>1</sup> “Crypto asset” refers to “an asset issued and/or transferred using blockchain or distributed ledger technology.” See Mtn. to Dismiss, Dkt. 25 at 4 n.2.

<sup>2</sup> Available at <https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023>.

1 on the premise that “many of the crypto assets” bought and sold through Payward are “investment  
 2 contracts” subject to the laws and regulations governing the U.S. securities market. *Id.* ¶ 14. But  
 3 crypto assets are not automatically securities. The SEC’s overly broad interpretation of investment  
 4 contract means that the SEC is exceeding its authority by attempting to regulate non-securities.

5 **A. State-law cases inform the definition of “investment contract.”**

6 The Securities Act of 1933 and the Exchange Act of 1934 define “security” based on an  
 7 enumerated list including “investment contract,” among other “instrument[s] commonly known as a  
 8 ‘security.’” 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10). The Supreme Court set forth a test for  
 9 determining whether an instrument qualifies as an investment contract in *S.E.C. v. W.J. Howey Co.*,  
 10 328 U.S. 293, 298-301 (1946). *Howey* established a three-part test requiring: “(1) an investment of  
 11 money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of  
 12 others.” *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009) (quoting *SEC v. Rubera*, 350 F.3d  
 13 1084, 1090 (9th Cir. 2003)). The third prong of this test requires both an “expectation of profit” and  
 14 that “expected profits are the product of the efforts of a person other than the investor.” *Id.*

15 The Supreme Court held that Congress, in adopting this test, incorporated the “common” and  
 16 “uniformly applied” understanding of “investment contract,” which had been “crystallized” through  
 17 state cases. *Howey*, 328 U.S. at 298; *see also SEC v. Edwards*, 540 U.S. 389, 393 (2004). As the Court  
 18 noted, the term was “common in many state ‘blue sky’ laws in existence prior to the adoption of the  
 19 federal statute and, although the term was also undefined by the state laws, it had been broadly  
 20 construed by state courts so as to afford the *investing public* a full measure of protection.” *Howey*,  
 21 328 U.S. at 298 (emphasis added). Widely adopted in over 33 states, blue sky laws addressed  
 22 “speculative schemes having no more basis than so many feet of blue sky” such as shares in  
 23 “nonexistent gold mines.” *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937, 938 (Minn. 1920). But  
 24 these laws were not designed as general-purpose consumer protection laws.

25 One such blue sky law included a registration requirement that applied to “stocks, bonds,  
 26 investment contracts, or other securities.” Minn. Laws 1917, ch. 429 § 3, as amended by Minn. Laws  
 27 1919, ch. 105, 257. In a leading case, *Gopher Tire*, the Minnesota Supreme Court found certificates  
 28 to be “investment contracts” where the certificates were “contracts” that “induce[d]” an “investment”

1 by “promis[ing] a share in defendant’s profits,” which the investor received in exchange for that  
 2 investment. 177 N.W. at 938. The court interpreted “investment contract” to involve an “investment”  
 3 as that term was “commonly used and understood”: “placing of capital or laying out of money in a  
 4 way intended to secure income or *profit from its employment.*” *Id.* (emphasis added).

5 Applying a similar analysis to *Gopher Tire*, Kentucky’s highest court held in *Lewis v. Creasey*  
 6 *Corp.* that an offer by a grocery wholesaler to local stores to pay \$300 for the right to buy groceries  
 7 for only five percent above cost was not a “contract” within the meaning of the securities law. 248  
 8 S.W. 1046, 1049 (Ky. 1923). The court reasoned that the wholesaler had not “promised” to give the  
 9 participants in the deal any part of his future profits. *Id.* As with *Gopher Tire*, the court’s analysis was  
 10 driven by the fundamental conclusion that the legislature acted to cover the essential attributes of a  
 11 security, and not enact a general-purpose consumer protection law. *Id.* at 1048. Blue sky laws  
 12 protected investors expecting profits from a business or enterprise—they were not designed to protect  
 13 consumers who purchased an asset anticipating that it would increase in value.

14 Because the Supreme Court in *Howey* interpreted “investment contract” to encompass the  
 15 meaning of that term as “crystallized” by the blue-sky law cases, the limitations recognized in those  
 16 cases should inform the interpretation here. 328 U.S. at 298. “Investment contracts” under the  
 17 Securities Act and the Exchange Act are not meant to serve as general consumer protection statutes  
 18 covering all asset purchases. *See Wals v. Fox Hills Dev. Corp.*, 24 F.3d 1016, 1018-19 (7th Cir. 1994)  
 19 (“The statutory language … suggests that the term ‘investment contract’ has the limited purpose of  
 20 identifying unconventional instruments that have the essential properties of a debt or equity  
 21 security.”). The SEC’s interpretation, however, ignores these limitations and seeks to apply  
 22 “investment contract” to assets that do not meet the *Howey* definition.

23 **B. The SEC wrongly expands the definition of “investment contract” in this  
 24 enforcement action to any asset that could increase in value.**

25 The SEC’s theory functions as a regulatory power grab through an expansive interpretation of  
 26 “investment contract” that would encompass many non-securities transactions. *Howey*’s three-part  
 27 test requires: “(1) an investment of money (2) in a common enterprise (3) with an expectation of  
 28 profits produced by the efforts of others.” *Warfield*, 569 F.3d at 1020.

1       The test for “investment contract” is not met, without more, for crypto assets sold on a  
 2 secondary market platform for multiple reasons. To begin, there is no contract or series of contracts  
 3 for the issuer of the crypto asset to provide post-sale value to the buyer of such asset. As the Motion  
 4 to Dismiss explains, the SEC has not alleged any contractual relationship between the 11 issuers and  
 5 the persons who buy the crypto assets on the secondary market platform. Dkt. 25 at 1. The SEC also  
 6 has not alleged that crypto asset buyers using Payward’s platform had an expectation in the income,  
 7 profits, or assets of any business. Instead, the SEC alleges that crypto purchasers had an expectation  
 8 of increased “demand for and value of” their crypto assets based on the “managerial efforts” of the  
 9 blockchain networks with which the crypto assets are associated. *See, e.g.*, Compl. ¶¶ 235, 237.

10       In other words, the SEC’s theory is that purchasers who bought crypto assets on the Payward  
 11 exchange expected that the value of those crypto assets would increase because the blockchain  
 12 networks would continue to develop and “attract users to the technology.” Compl. ¶ 236. But there is  
 13 simply no continuing obligation by the issuers alleged here. The SEC is thus asking courts to find an  
 14 “investment contract” under *Howey* in the absence of either a common enterprise or any contract with  
 15 continuing obligations. *Cf. Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274, 276 (7th Cir. 1972)  
 16 (“Judicial analyses of the question whether particular investment contracts are ‘securities’ within the  
 17 statutory definition have repeatedly stressed the significance of finding a common enterprise.”).  
 18 Instead, SEC’s theory is based merely on the *voluntary maintenance* of the blockchain networks and  
 19 purchasers’ hopes that the value of the crypto assets they purchased on the secondary market will  
 20 increase. *See, e.g.*, *Noa v. Key Futures, Inc.*, 638 F.2d 77, 79 (9th Cir. 1980) (finding agreement to  
 21 sell silver bars were not “investment contracts” because after the sale “the profits to the investor  
 22 depended upon the fluctuations of the silver market, not the managerial efforts of Key Futures”).

23       Such an expansive view would turn ordinary baseball card collectors into securities investors  
 24 and third-party sellers of baseball cards into securities exchanges. A baseball card collector purchases  
 25 cards in the hope that such cards will increase in value. The value of her card collection is dependent—  
 26 like the blockchain networks attracting new users—on the viability of the card market and the card  
 27 issuer’s ability to attract new collectors. But the card collector has no continuing contractual  
 28 relationship with either the card issuer or the seller of the card, and certainly no expectation of sharing

1 the card issuer's profits. Consumer protection laws apply, but securities laws do not.

2 *Lewis v. Creasey Corp.*, discussed above, is also instructive. There, a grocery wholesaler  
 3 permitted local stores to pay \$300 for the right to buy groceries for only five percent above cost. 248  
 4 S.W. at 1049. The local stores depended on the wholesaler for inventory and thus would expect their  
 5 own profits to turn on the wholesaler's sound managerial efforts. But that did not create an investment  
 6 contract. As Kentucky's highest court explained, “[i]n one sense of the word every contract is an  
 7 investment by the parties thereto.” *Lewis*, 248 S.W. at 1049. But an “investment contract” for  
 8 purposes of blue sky laws, and consequently the Exchange and Securities Act, does not encompass  
 9 all contracts. *Lewis*, 248 S.W. at 1049. The wholesaler's offer was not an “investment contract”  
 10 because he had not “promised” to give the local stores any part of his future profits. *Id.* Similarly,  
 11 even if the crypto purchasers depend on the sound management of the blockchain networks for the  
 12 increased value of their crypto assets, the purchasers do not expect a share of the *blockchain networks*'  
 13 profits. Instead, they are simply the holders of an asset; therefore, purchase of the crypto assets on the  
 14 secondary market platform are not investment contracts.

15 There are multiple reasons why someone might purchase an asset with hopes that its value or  
 16 market price will go up in the future. This could include rarity (like art or any other collector's item),  
 17 network effects (which are common in technology), or economies of scale causing prices for services  
 18 associated with the good to go down. But this does not turn the purchase of such an asset into an  
 19 investment contract. The SEC's expansive interpretation of “investment contract” would mean that  
 20 Congress somehow intended the SEC to function as a general-purpose consumer protection regulator  
 21 for any crypto asset where purchasers hope the value will increase. That simply is not the case, and  
 22 this over-reach will become increasingly problematic as the crypto-asset economy expands.

23 **C. The SEC's overly broad interpretation of “investment contract” and claimed  
 24 authority over crypto assets squarely implicates the major questions doctrine.**

25 The who and what of regulating crypto assets is the subject of fierce debate.<sup>3</sup> And without a  
 26 clear answer from Congress, the SEC has appointed itself crypto regulator. When a federal

27 <sup>3</sup> Soumen Datta, *SEC v. CFTC: Inside the Battle for Control of the Crypto Landscape*, BSC News  
 28 (May 16, 2023), available at, <https://www.bsc.news/post/sec-vs-cftc-inside-the-battle-for-control-of-the-crypto-landscape>.

1 administrative agency attempts to exercise new authority over an area of great economic or political  
 2 significance, it requires “clear congressional authorization.” *See W. Va. v. EPA*, 142 S. Ct. 2587,  
 3 2608-09 (2022). Under the major questions doctrine, courts “presume that Congress intends to make  
 4 major policy decisions itself, not leave those decisions to agencies.” *Id.* (internal quotations omitted).  
 5 The doctrine protects important constitutional principles including “self-government, equality, fair  
 6 notice, federalism, and the separation of powers.” *Id.* at 2621 (Gorsuch, J., concurring). Here, the  
 7 major questions doctrine forecloses the SEC’s expansive view of its authority to regulate crypto assets  
 8 in the absence of congressional legislation.

9 *First*, the SEC’s regulation of crypto assets is economically and politically significant. The  
 10 crypto asset industry has grown by some estimates to a total value of almost \$2 trillion dollars, and  
 11 the total estimated value of Bitcoin alone is over \$1 trillion.<sup>4</sup> Moreover, one in five Americans has  
 12 invested in, traded, or used cryptocurrency.<sup>5</sup> The SEC claims that Payward unlawfully failed to  
 13 register as an exchange, broker, dealer, or clearing house based on the agency’s interpretation that  
 14 crypto assets qualify as securities. *See Compl.* ¶¶ 446-454. If permitted to regulate based on the SEC’s  
 15 expansive view of “investment contract,” the SEC’s reach would extend broadly across the industry  
 16 and result in significant economic effects given the regulatory costs to industry participants. The  
 17 SEC’s claim of authority is also politically significant. Congress has considered dozens of legislative  
 18 proposals about cryptocurrency, including whether crypto assets should be treated as securities  
 19 regulated by the SEC or commodities regulated by the Commodity Futures Trading Commission.<sup>6</sup>

20 *Second*, regulation of crypto assets departs from the SEC’s historical regulation. In applying  
 21 the major questions doctrine, courts look at an agency’s history of regulation and the implications of  
 22 the power it is claiming for itself. *See Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*,

23 <sup>4</sup> See Shayak Majumder, *Cryptocurrency Price Today: Cryptocurrency Price Today: Bitcoin*  
 24 *Remains Stable, Ethereum Slowly Approaches \$3,000*, ABP News Live (Feb. 23, 2024), available  
 25 at <https://news.abplive.com/business/crypto/crypto-price-today-february-23-check-global-market-cap-bitcoin-btc-ethereum-doge-solana-litecoin-axl-imx-live-tv-1666696>; *Bitcoin Market Cap*,  
 available at [https://ycharts.com/indicators/bitcoin\\_market\\_cap](https://ycharts.com/indicators/bitcoin_market_cap) (last visited Feb. 22, 2024).

26 <sup>5</sup> Thomas Franck, *One in 5 Adults Has Invested In, Traded or Used Cryptocurrency*, NBC News  
 27 Poll Shows, NBC News (March 31, 2022), available at <https://www.nbcnews.com/tech/tech-news/one-five-adults-invested-traded-used-cryptocurrency-nbc-news-poll-show-rcna22380>.

28 <sup>6</sup> See Jason Brett, *Congress Creates a Storm of Crypto Legislation*, Forbes (Aug. 3, 2023),  
<https://www.forbes.com/sites/jasonbrett/2023/08/03/congress-creates-a-storm-of-crypto-legislation/?sh=5d477f093aa4>.

1 141 S. Ct. 2485, 2489 (2021). The enforcement action in this suit contradicts SEC Chair Gary  
 2 Gensler's testimony in 2021 regarding crypto asset regulation: "exchanges trading in these crypto  
 3 assets do not have a regulatory framework either at the SEC, or our sister agency, the Commodity  
 4 Futures Trading Commission."<sup>7</sup> And, as described above, expanding "investment contract" to  
 5 purchases of assets without a contract for the issuer of the crypto asset to provide post-sale value to  
 6 the buyer of such asset departs from historical practice. *See* Dkt. 25 at 10-11 (citing Brief for the SEC  
 7 at \*17, *SEC v. Edwards*, No. 02-1196 (U.S. June 26, 2003), 2003 WL 21498455 ("The second word  
 8 in [investment contract] means an agreement between two or more persons to do or forbear  
 9 something.") (cleaned up); Brief for the SEC at \*9, *SEC v. Howey*, No. 843 (U.S. April 17, 1946),  
 10 1946 WL 50582 (an "investment contract" includes "any contractual arrangement for the investment  
 11 of money in an enterprise with the expectation of deriving profit through the efforts of the  
 12 promoters")). Under the major questions doctrine, the SEC has failed to show clear congressional  
 13 authorization to regulate crypto assets absent an "investment contract."

14 **D. The federalism canon shuts down the SEC's expansive view of "investment  
 15 contract" because it potentially preempts important state laws.**

16 Like the major questions doctrine, the federalism canon also forecloses the SEC's  
 17 interpretation of "investment contract" because it would upend the traditional division of powers  
 18 between the States and the federal government. Courts do not assume that Congress exercises lightly  
 19 its "extraordinary power" to preempt state law. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).  
 20 Instead, "if Congress intends to alter the usual constitutional balance between the States and the  
 21 Federal Government, it must make its intention to do so *unmistakably clear* in the language of the  
 22 statute." *Id.* (emphasis added) (cleaned up). The SEC's interpretation here would preempt areas of  
 23 law traditionally regulated by states such as consumer protection. The court should reject the SEC's  
 24 expansive view of "investment contract" under the federalism canon.

25 <sup>7</sup> *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors  
 26 Collide, Part III*, Hr'g Before the U.S. H. Fin. Servs. Comm., 117th Cong. 12 (May 6, 2021)  
 27 (statement of SEC Chair Gary Gensler), <https://tinyurl.com/mtrnkbn2>; *see also* Dkt. 25 at 5 n.11  
 28 (citing Hester M. Peirce, Comm'r, SEC, Outdated: Remarks Before the Digital Assets at Duke  
 Conference (Jan. 20, 2023), <https://tinyurl.com/47cypbvt> ("[I]f we seriously grappled with the legal  
 analysis and our statutory authority, . . . we would have to admit that we likely need . . . more  
 clearly delineated, statutory authority . . . to require crypto trading platforms to register with us.")).

1                   **1. The SEC's position could preempt important state consumer protection laws.**

2                   The SEC's actions seek to radically expand its authority into areas of traditional state  
 3 regulation and other fields of law such as general consumer protection, which could preempt state  
 4 laws that are *more* protective of consumers than the securities laws. The National Securities Markets  
 5 Improvement Act of 1996 ("NSMIA") preempts states from applying their own registration and  
 6 qualification requirements to securities offerings and transactions in NSMIA-covered "securit[ies]."  
 7 This includes security offerings by issuers traded on national securities exchanges. 15 U.S.C. § 77r(a).  
 8 The definition of "sale" and "offer," *see* 15 U.S.C. § 77b(a)(3), can include secondary market  
 9 transactions as well. *S.E.C. v. Ripple Labs, Inc.*, No. 20 CIV. 10832 (AT), 2023 WL 4507900, at \*11  
 10 n.16 (S.D.N.Y. July 13, 2023) (collecting authorities). The NSMIA's language is broad, providing  
 11 that states may not "directly or indirectly prohibit, limit, or impose conditions, based on the merits of  
 12 such offering or issuer, upon the offer or sale of any [covered] security. . . ." 15 U.S.C. § 77r(a)(3).

13                   The NSMIA contains an exception to preemption, but it is limited to states enforcing their  
 14 laws related to "fraud or deceit." 15 U.S.C. § 77r(c)(1)(A). Many state regulations are far more  
 15 nuanced than these two categories, or they are expressly designed to provide substantive oversight  
 16 and protections for consumers. As of 2018, thirty-eight states and the District of Columbia had  
 17 prohibitions against "unfair" acts and practices in their consumer protection laws.<sup>8</sup> For example, the  
 18 Montana Consumer Protection Act prohibits "[u]nfair methods of competition and unfair or deceptive  
 19 acts or practices in the conduct of any trade or commerce." Mont. Code § 30-14-103. These are  
 20 important protections for consumers that do not require conduct to be deceptive to be actionable. The  
 21 SEC's treatment of crypto assets as securities absent an investment contract could potentially preempt  
 22 important state law protections for consumers related to crypto assets that the securities laws do not  
 23 provide.

24                   The Ninth Circuit *Myers v. Merrill Lynch & Co.* case illustrates the potential preemptive  
 25 effect. 249 F.3d 1087 (9th Cir. 2001). In *Myers*, the court affirmed dismissal of the plaintiff's state  
 26 law claims challenging "penalty bids" and similar restrictions imposed by brokers to discourage

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<sup>8</sup> *See, e.g.*, National Consumer Law Center, *Consumer Protection in the States: A 50-State*

28 *Evaluation of Unfair and Deceptive Practices Laws* (March 2018), available at  
<https://filearchive.nclc.org/udap/udap-report.pdf>.

1 potential purchasers of stock in public offerings from quickly reselling their shares to turn a quick  
 2 profit. *Id.* at 1088. The Ninth Circuit adopted the district court's reasoning that the plaintiff's claims  
 3 under California's unfair and deceptive acts and practices law were preempted by federal regulation  
 4 of securities transactions. *Id.* The district court reasoned that although the NSMIA provided an  
 5 exception from preemption for state claims involving fraud or deceit, "the SEC has exercised its  
 6 congressionally delegated rulemaking authority to craft a regulatory scheme, i.e., Regulation M, to  
 7 deal with these practices and protect investors from fraudulent or misleading conduct associated with  
 8 the use of penalty bids." *Myers v. Merrill Lynch & Co.*, No. C-98-3532 WHO, 1999 WL 696082, at  
 9 \*9-10 (N.D. Cal. Aug. 23, 1999), *aff'd*, 249 F.3d 1087.

10 *Myers* demonstrates the potential preemptive effect of federal securities law on state laws that  
 11 may be *more protective* of consumers and are passed through democratic processes that are closer  
 12 and more accountable to the people of the various states.<sup>9</sup> It was undisputed in *Myers* that the  
 13 purchased shares were "securities" under federal law where Congress had made a policy decision to  
 14 delegate authority to an unelected regulatory body to preempt state law. But for crypto assets without  
 15 an investment contract, Congress has made no such decision. Erroneously characterizing these crypto  
 16 assets as securities therefore potentially leads to preemption that Congress never approved.

17 **2. *Several state laws regulating crypto assets could also be preempted.***

18 The SEC's attempted preemption of crypto assets also stymies state legislative  
 19 experimentation in this area. Courts have "long recognized the role of the States as laboratories for  
 20 devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). But  
 21 federalism—and its byproduct of legislative variation from the state laboratories of democracy—is  
 22 defeated when federal agencies act without authority to preempt state legislation. States have already  
 23 acted to regulate crypto assets and will presumably continue to legislate as new issues present  
 24 themselves. The SEC's regulation of crypto assets absent an investment contract unlawfully deprives  
 25 the States of their police power and limits legal innovation and tailoring in this emerging area.

26 <sup>9</sup> Treating crypto assets as securities would also force private claimants into the framework of Rule  
 27 10b-5, which requires several elements before a plaintiff can prevail. For example, a plaintiff must  
 28 allege a false or misleading statement or omission by the defendant of a material fact in connection  
 with the purchase or sale of a security; scienter; reliance; and causation of economic loss. *In re  
 Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 699 (9th Cir. 2021).

1 Many states have implemented statutory and regulatory regimes that treat crypto assets as  
2 money transmitters. Some states have directly defined money transmitters to include virtual  
3 currencies. *See Ala. Code §§ 8-7A-2, 8-7A-5* (license required for money transmission, including  
4 receiving “virtual or fiat currencies”); Conn. Gen. Stat. § 36a-600(c) (companies transmitting virtual  
5 currency face extra scrutiny based on “undue risk of financial loss to consumers, considering the  
6 applicant’s proposed business”); Florida Stat. § 560.204 (money transmitters); Ga. Code § 7-1-  
7 680(30) (“virtual currency” is “a digital representation of monetary value,” bringing virtual currencies  
8 within licensing and regulatory regime for money transmission); *see also United States v. Harmon*,  
9 474 F. Supp. 3d 76, 89 (D.D.C. 2020) (Bitcoin—and by definition other crypto assets—are “money”  
10 for purposes of the D.C. Money Transmitters Act); *State v. Espinoza*, 264 So. 3d 1055, 1064 (Fla.  
11 Dist. Ct. App. 2019) (virtual currencies fall within the money services businesses).

12 Money transmitters are generally required to register and show minimum net worth, sufficient  
13 security, and subject themselves to examinations by state regulators.<sup>10</sup> State regulatory schemes  
14 prohibit, for example, “gross negligence in any transaction by a money services business, regardless  
15 of reliance thereon by, or damage to, a customer”; “[f]ailure to maintain, preserve, keep available for  
16 examination, and produce all books, accounts, files, or other documents required by this chapter”;  
17 and “[i]nsolvency.” Fla. Stat. § 560.114(1)(b), (e), (i). Further, “most licensed money transmitters are  
18 examined annually by either multi-state teams or individual states to ensure licensees operate in a safe  
19 and sound manner, and in adherence to state and [FinCEN] laws and regulations.”<sup>11</sup> These examples  
20 of state regulations are commonsense but absent in securities regulation, which does not serve the  
21 same purpose. These carefully crafted state regimes are at risk of being preempted.

## CONCLUSION

23 For the foregoing reasons, the court should reject categorizing crypto assets as securities  
24 absent an investment contract. The SEC's exercise of this undelegated authority puts state consumers  
25 at risk by preempting state statutes better tailored to the specific risks of non-securities products.

<sup>26</sup> <sup>27</sup> <sup>10</sup> See Cong. Research Serv., *Telegraphs, Steamships, and Virtual Currency: An Analysis of Money Transmitter Regulation* at 3 (Aug. 20, 2020), <https://crsreports.congress.gov/product/pdf/R/R46486>.

<sup>11</sup> Conference of State Bank Supervisors & Money Transmitter Regulators Ass’n, *The State of State Money Services Business Regulation & Supervision* at 9 (2016), <https://www.csbs.org/sites/default/files/2017-11/State%20of%20State%20MSB%20Regulation%20and%20Supervision%202.pdf>.

1 Dated: February 29, 2024

Respectfully submitted,

2 AUSTIN KNUDSEN  
3 *Montana Attorney General*

4 By: /s/ Drew C. Ensign  
5 Drew C. Ensign (SBN 243956)

6 **HOLTZMAN VOGEL BARAN TORCHINSKY &  
7 JOSEFIAK PLLC**

8 2575 East Camelback Rd, Ste 860  
9 Phoenix, AZ 85016  
10 602-388-1262  
11 [densign@holtzmanvogel.com](mailto:densign@holtzmanvogel.com)

12 *Counsel for the State of Montana*

13  
14 ALSO SUPPORTED BY:

15 TIM GRIFFIN  
16 ARKANSAS ATTORNEY GENERAL

17 BRENNA BIRD  
18 IOWA ATTORNEY GENERAL

19 LYNN FITCH  
20 MISSISSIPPI ATTORNEY GENERAL

21 MIKE HILGERS  
22 NEBRASKA ATTORNEY GENERAL

23 DAVE YOST  
24 OHIO ATTORNEY GENERAL

25 MARTY JACKLEY  
26 SOUTH DAKOTA ATTORNEY GENERAL

27 KEN PAXTON  
28 TEXAS ATTORNEY GENERAL